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Nos. 86-69 and 86-276

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Respondents

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Cross-Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Respondents

On Petitions for a Writ of Certiorari to the Supreme Court of Vermont

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

This memorandum is filed to address the impact of the decision in *American Trucking Associations, Inc.* v. *Scheiner*, No. 86-357 (June 23, 1987), on the pending petition and cross-petition in the above-captioned cases.[1]

[1] Our first supplemental memorandum, filed in September 1986, called the Court's attention to the decision of the Supreme Court of New Hampshire in *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986). That decision embraced legal principles squarely contradictory to those followed by the court below with respect to the duty to refund unconstitutional taxes.

The issue raised by the petition is whether the Constitution obligates Vermont to refund moneys collected from petitioners pursuant to flat highway taxes found to violate the Commerce Clause or whether the State may invoke principles of sovereign immunity to preclude a refund remedy. The State's conditional cross-petition challenges the underlying holdings of the Vermont Supreme Court that the taxes at issue violate the Commerce Clause.

We assume that this Court has withheld action in this case because the important refund issue it presents would have been mooted by a decision upholding the lawfulness of the similar Pennsylvania highway taxes involved in *Scheiner*. Now that *Scheiner* has been decided against the constitutionality of the taxes there at issue, however, the refund question is ripe for consideration and is of vital importance to the trucking industry and the states. Accordingly, we submit that the Court should grant ATA's petition and deny Vermont's cross-petition.

1. The $40 entry fee provided by Vermont's Act 87 and the $50 decal tax enacted by Act 172 were each subject to attack on two grounds. First, they were challenged as embodying a facial or structural discrimination: the entry fee in terms applied only to out-of-state trucks, and the decal tax, though seemingly neutral on its face, was in fact accompanied by an equal reduction in truck registration fees that fully offset its financial impact on Vermont-registered trucks. Second, both taxes were challenged as discriminatory because they were "flat"—i.e., not related to the extent of any vehicle's actual use of Vermont's highways.

In the challenge to Act 172, the Vermont Superior Court found that the decal fee had a discriminatory impact in actual operation because it imposed a per-mile cost 22 times greater for out-of-state trucks than for Vermont-registered trucks (86-69 Pet. App. 59a). It accordingly held that Act 172's "flat tax" feature vio-

lated the Commerce Clause. The Vermont Supreme Court agreed that Act 172 (and Act 87 as well) was unconstitutional, but it rested its holdings on the alternative ground that the taxes entailed facial discrimination not justified under the compensatory tax doctrine (*id.* at 7a-8a, 18a-20a).

Although this Court in *Scheiner* had no occasion to reach the facial discrimination issue that was common to both cases, the decision makes clear beyond peradventure that Vermont's taxes violate the Commerce Clause in precisely the same manner as Pennsylvania's axle tax and marker fee. Vermont's taxes, like Pennsylvania's, were of a fixed amount unrelated to the extent of actual highway use. As the Court stated in *Scheiner*, such highway taxes are "plainly discriminatory" because "they impose a cost per mile on [out-of-state] trucks that is [many times greater than] the cost per mile borne by local trucks" (slip op. 18). Thus, there is absolutely no reason to review the issue raised in Vermont's cross-petition (No. 86-276).

2. Because the ruling in *Scheiner* establishes that Vermont exacted highway taxes from out-of-state companies in violation of the Commerce Clause, the refund issue raised in the petition is fully ripe for adjudication by this Court. We need not repeat here the reasons fully canvassed in our petition and reply brief why this question is important and timely. We simply note two intervening developments that bear upon the decision whether to grant review on this issue.

a. Vermont's principal argument in opposition to the petition was the claim that ATA had not preserved, and as a result the Vermont Supreme Court had not passed upon, the question whether the Constitution requires a refund of taxes collected in violation of the Commerce Clause. We have answered that argument at pages 1-7 of our reply brief. Our submission has been confirmed by a recent Vermont state court decision. In *American*

Trucking Associations, Inc. v. *Conway*, No. S-95-86WnC (Washington Co. May 4, 1987), the Vermont Superior Court held unconstitutional highway tax legislation adopted by the State following the invalidation of Act 172.[2] Nevertheless, the Superior Court denied a refund of the unconstitutionally-exacted taxes and expressly rejected ATA's arguments based on a constitutional right to a refund. The Superior Court stated that the Vermont Supreme Court had necessarily rejected those federal claims in the decisions below in the instant case and that it was "bound by those decisions." Slip op. 10.

b. In *First Lutheran Church* v. *Los Angeles County*, No. 85-1199 (June 9, 1987), the Court faced a similar question—whether a state could limit the remedies for a violation of the Takings Clause to injunctive relief, or whether the Constitution requires the payment of monetary compensation *ex proprio vigore*. The Court held that the Constitution itself requires a monetary remedy for the constitutional violation, despite claims of sovereign immunity. See slip op. 10-11 & n.9. This decision casts further doubt on Vermont's contention that a state may exact taxes in violation of the Commerce Clause and then assert sovereign immunity to defeat a claim for a refund of the wrongfully withheld property.

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[2] A copy of this opinion has been lodged with the Clerk of the Court.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 86-69 should be granted and the cross-petition in No. 86-276 should be denied.

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